In the Supreme Court of the United States

OCTOBER TERM, 1924

SANFORD & BROOKS CO., APPELLANT
v.
THE UNITED STATES
No. 175

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

STATEMENT OF CASE

On July 31, 1914, the appellant entered into a contract with the United States to do certain dredging in Broad Creek, Maryland. The contract, which is set out in full on pages 15–20 of the Record and which, by reference, included the Government's specifications for the work, pages 6–15 of the Record, provided that the appellant should be paid for the work done by it under the contract at the rate of 7–9/10 cents for each cubic yard of material dredged. The appellant began work on November 16, 1914, and completed the contract on December 12, 1916, and was paid in full the contract price for the number of cubic yards dredged. (Finding of Fact No. III, page 21 of the Record.)

26815—25

The specifications stated that the material to be removed was believed to be *mud and sand,* but that bidders were expected to examine the work and decide for themselves its character and to make their bids accordingly, as the United States did not guarantee the accuracy of the description. The specifications further provided that the price bid per cubic yard for dredging should cover the cost of removal and disposition of all material encountered except ledge rock. Before bidding the appellant *did* examine the work and found that the material to be dredged consisted of *mud, sand, hard sand, and hard clay.* Thereafter and with this knowledge it entered into the contract. (Finding of Fact, No. V, page 22 of the Record.)

It turned out that the material to be dredged was mud, sand, hard sand, and hard clay, with some stumps. (Finding of Fact, No. V, page 22 of the Record.)

Nothing in the record indicates any knowledge on the part of the United States or its officers that the material to be dredged consisted of more than mud and sand.

Upon the facts thus stated rests the principal part of the appellant's claim, appellant contending that the statement in the specifications that the material to be removed was believed to be mud and sand was a representation amounting to a warranty, that it was false, that there was, therefore, a breach of warranty, and that appellant was damaged therefor in the amount of $47,125.98.

The lesser portion of appellant's claim is for $22,-502.18. This portion of its claim is based upon the following facts additional to those already stated:

The appellant began work under the contract at a place and upon lines designated by a Government inspector. A little more than a month after beginning work, to wit, on December 18, 1914, it was ascertained that the dredging being done was, as the result of an error, not within the area indicated on the contract drawings. The contracting officer, however, the error having been discovered, directed that the work proceed along the wrong location until it reached a point coinciding with the location named in the contract and thence upon the proper location. So there was some dredging, 28,098 cubic yards in all, outside the contract lines, part of which was done because of an error as to the location of the lines and part after the specific direction of the contracting officer.

The appellant did the work outside the contract lines without protest in writing, without claim for extra work under the provisions of the contract, and accepted the contract price for such work. The material dredged outside the contract lines was of the same character as that within the lines. (Findings of Fact III and V, pages 21 and 22 of the Record.)

Under these circumstances the appellant claims it is entitled to be paid *quantum meruit* for the work done outside the contract lines.

ARGUMENT

At the time when it is necessary to send this brief to the printer appellant's brief has not been received. We are obliged, therefore, to discuss the case without definitely knowing what arguments appellant will make or what authorities it proposes to present.

No argument, as we view it, is needed to defeat the principal portion of the claim. The Findings of Fact remove any justification for it. The alleged basis for the claim—that the appellant acted upon a misrepresentation as to the character of the material to be dredged—vanishes in the light of the Finding of Fact that before it made its bid and before it entered into the contract the appellant examined the work, as the specifications required it to do, and ascertained that the material to be removed was precisely of the nature it now complains it turned out to be.

In the first place, there was no misrepresentation. The specifications stated that the material to be removed "is believed to be mud and sand." Nothing in the Findings of Fact indicates that the United States had knowledge of any facts inconsistent with that declaration of belief. Therein, of course, is the great distinction between this case and the case of *Atlantic Dredging Company* v. *The United States*, 253 U. S. 1, upon which appellant relied below.

In the *Atlantic Dredging Company case* the Government in its specifications stated that the materials to be dredged were believed to be mud and sand. The facts were, however, that the officers of the

Government knew at the time that the materials to be excavated were of a character more difficult of excavation than mud and sand. Moreover, in that case the dredging company acted solely upon the Government's representation. It made no investigation of its own. Clearly, therefore, that case gives no support to appellant's contention here.

In the second place, even if there had been misrepresentation by the United States as to the nature of the material to be dredged, appellant can not claim to have been misled or damaged thereby. It had full knowledge of the true facts, gained from its own examination, before it made its bid.

Nor, as we view it, is argument required to defeat the lesser portion of appellant's claim. Appellant did certain extra work under the direction of the contracting officer. It was not work of a different nature or more difficult character than the work within the lines originally mapped out. Undoubtedly appellant did this extra under the contract. If it considered it was doing it outside the contract and upon a different basis as to compensation, then, under Paragraph 39 of the Detailed Specifications (page 15 of the Record), which was a part of the contract (See Article 1 of the contract, page 16 of the Record), it was its duty to file a written protest. This paragraph of the specifications reads as follows:

> *Claims and Protests.*—If the contractor considers any work required of him to be outside the requirements of the contract or considers any record of ruling of the inspectors or con-

> tracting officer as unfair, he shall ask for written instructions or decision immediately and then file a written protest with the contracting officer against the same within three (3) days thereafter or be considered as having accepted the record or ruling.

The appellant accepted and followed without protest the ruling and direction of the contracting officer. Perforce paragraph 39, therefore, it can not now ask greater compensation than that named in the contract, and which it accepted for the extra work upon the completion of the contract.

Moreover, Article 7 of the contract provided:

> No claim whatever shall at any time be made upon the United States by the contractor for or on account of any extra work or material performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or material shall have been expressly required in writing by the contracting officer, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers.

There is no pretense that there was any compliance with this provision of the contract. Without such compliance recovery for extra work is precluded by the very terms of the contract.

In *Plumley* v. *United States*, 226 U. S. 545, where there was a similar provision in the contract, which

had not been complied with, this court held there could be no recovery. The court said:

> The other items for extra work were properly disallowed. The contract provided that changes increasing or diminishing the cost must be agreed on in writing by the contractor and the architect, with a statement of the price of the substituted material and work. Additional precautions were required if the cost exceeded $500. In every instance it was necessary that the change should be approved by the Secretary. There was a total failure to comply with these provisions, and though it may be a hard case, since the court found that the work was in fact extra and of considerable value, yet Plumley can not recover for that which, though extra, was not ordered by the officer and in the matter required by the contract. Rev. Stat. sec. 3744; *Hawkins* v. *United States*, 96 U. S. 689; *Ripley* v. *United States*, 223 U. S. 695; *United States* v. *McMullen*, 222 U. S. 460.

CONCLUSION

We respectfully suggest that upon no theory as to either part of its claim is the appellant entitled to recover and that the judgment below should be affirmed.

JAMES M. BECK,
Solicitor General.
MERRILL E. OTIS,
Special Assistant to the Attorney General.

JANUARY, 1925.

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Mr. Merrill E. Otis, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Sanford & Brooks Co. agreed with the United States to dredge a channel at a fixed rate per cubic yard of material dredged. Payment for the number of yards dredged was made at the contract rate. Later, this suit was brought to recover additional sums, as upon a *quantum meruit*. One claim was that the material to be removed within the contract lines had been misdescribed in the specifications; and the rule applied in *United States* v. *Atlantic Dredging Co.*, 253 U. S. 1, and *United States* v. *Spearin*, 248 U. S. 132, was invoked. Another claim was that, through a mistake of the Government's representative, work had been done outside the limits prescribed by the contract, and that this was more burdensome. The Court of Claims, after a hearing upon the evidence, entered judgment for the defendant. 58 Ct. Cls. 158. The case is here on appeal under § 242 of the Judicial Code. The appeal was filed in this Court on September 20, 1923. It was not reached for argument until January 15, 1925. On January 9, 1925, the plaintiff filed, with its brief on the merits, a motion to remand. The document, including appendices, contained 65 printed pages.

The reliance in this Court was wholly upon the motion to remand. The claim on account of work inside the contract lines was not insisted upon here. The claim for work outside the contract lines was urged in the brief on the merits, but at the argument plaintiff conceded that, upon the findings of fact made, there could be no recovery. The contention then presented was that this Court could not come to a proper decision on

this claim without having findings as to the existence or non-existence of eight additional alleged facts; and that to this end the cause should be remanded to the lower court. The Government objected to the allowance of the motion to remand on the grounds that the findings already made were definite; that they included all material facts; and that, if the additional facts asserted were found, these would not change the legal result. The objections are, in our opinion, sound.

Plaintiff asserts that the additional findings would show that, when the erroneous location of the work was discovered, it made oral protest to the contracting officer of the Government against continuance of the work outside the contract lines; that it protested orally against payment for such work at the contract price; that, during the progress of the work, it made claim for payment upon a *quantum meruit* basis; that, seven months after the completion of the work in question, the Judge Advocate General gave an opinion on this claim favorable to the plaintiff; that the Assistant Secretary of War approved of the opinion; that he directed that negotiations be had with plaintiff concerning the amount of additional compensation to be paid; but that no agreement was reached. These, with other minor additions to the facts as found, are relied upon by plaintiff to show that, as to this work, the express provisions in the written contract which required prompt written protest against any order for work outside of the specifications, written modification of the contract if it was altered materially, and written orders for extra work, were all inapplicable or waived; and that a new oral agreement providing for compensation *quantum meruit* was substituted by implication. We are of opinion that the findings sought, if made, would be of no avail to plaintiff. Oral protests, a claim for additional compensation and a fa-

vorable advisory opinion thereon, would be facts clearly insufficient to establish plaintiff's contentions.

Moreover if those facts could conceivably affect the result, the motion should, as a matter of discretion, be denied because of the delay in filing it. A motion to remand for further findings, even if based wholly upon matter included in the original record on appeal, should be submitted at the first term of the entry of the case so that this Court may determine whether the motion shall be passed upon in advance of the hearing on the merits or be postponed until such hearing. Compare *United States* v. *Adams*, 9 Wall. 554, 559. Where, as in this case, the motion is based largely upon matter not appearing in the record on appeal, the reasons for insisting upon promptness in making an application to remand are particularly persuasive. Diligence in this respect is essential to the orderly and expeditious administration of justice. Compare Rule 14 of this Court governing petitions for certiorari for diminution of the record. *Chappell* v. *United States*, 160 U. S. 499.

Affirmed.